

Gulf States Manufacturers, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 692. Case 26-CA-8382

31 July 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

On 13 May 1982 the National Labor Relations Board issued a Decision and Order in this proceeding,¹ finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the Union concerning two layoffs of unit employees and Section 8(a)(1) by denying an employee's request for a union representative at an interview which he reasonably believed might result in disciplinary action. The Board, *inter alia*, ordered the Respondent to bargain in good faith with the Union on request and to make whole the laid-off employees in the unit for losses of pay resulting from the Respondent's unlawful action.

Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Fifth Circuit, and the Board cross-applied for enforcement of its Order. On 19 May 1983 the court issued its decision, enforcing the Board's unfair labor practice findings, but rejecting its backpay remedy and remanding the case to the Board for a finding on whether bargaining would have changed the number or timing of the Respondent's layoffs, or whether the Respondent's economic condition would have still required the layoffs.²

The Board subsequently filed a petition for rehearing on this issue. On 30 September 1983 the court denied the Board's petition,³ explaining as follows:

Our order that the Board "determine whether and by how much bargaining would have delayed the layoffs," was not directed at whether the *results* of bargaining would have affected the layoffs, but rather whether the *fact* of bargaining would have affected the layoffs We remanded the case to the Board merely to determine whether, in light of the evidence concerning the employer's economic condition, the layoffs would have been delayed

during the bargaining period and, if so, by how much.

On 31 October 1983 the Board advised the parties that it accepted the remand and that they might submit statements of position with respect to the remanded issue. Thereafter, the Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

There is no dispute that economic conditions motivated the layoffs.⁴ The question is whether the layoffs would have occurred as they did, notwithstanding adequate notice to, and good-faith bargaining with, the Union over the layoff decisions.

In our original decision, we found that Respondent laid off employees on 10 March and 8 April 1980. Respondent notified Local Union President Thompson about the 10 March layoff approximately 10 to 15 minutes before its implementation. Thompson discovered the Respondent's 8 April layoff by observing employees walking to the plant gate to turn in their hardhats and identification badges approximately 15 to 20 minutes before the shift was to end. At the same time, Director of Employee Relations Zeppelin telephoned Thompson to notify him of the layoff. We found that the Respondent provided insufficient notice to the Union concerning the layoffs, and that the Respondent's failure to bargain over the layoff decisions warranted a status quo ante remedy.⁵

The court observed that the Respondent adduced considerable testimonial and documentary evidence that the layoffs coincided with business declines, but that the Board made no finding whether the Respondent would have laid off employees even if it had fulfilled its bargaining obligation. The court accordingly denied enforcement of the Board's backpay order, and remanded for reconsideration of the remedy.

Having accepted the remand, we must observe the court opinion as the law of the case.

The judge in the unfair labor practice case credited unrefuted testimony of the Respondent's

⁴ In the original proceeding, the General Counsel alleged, and the Board found, that the Respondent's actions only violated Sec. 8(a)(5) and (1) of the Act, not Sec. 8(a)(3) and (1).

⁵ The Respondent was ordered to make the laid-off employees whole by paying them their normal wages from the date of layoff until the earliest of the following conditions was met:

(1) Mutual agreement is reached with the Union relating to the subjects about which the Respondent is required to bargain; (2) good-faith bargaining results in a bona fide impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. [261 NLRB at 853.]

¹ 261 NLRB 852 (1982).

² *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

³ 715 F.2d 1020, 1021.

comptroller, White, and its employee relations director, Zeppelin, that the Respondent was unable to predict the need for layoffs much in advance because of economic factors beyond its control, including bad weather, problems with financing, building or construction permits, and unexpected "holds" customers placed on orders. Thus, according to Zeppelin's credited testimony, the Respondent had only 2 days' notice of the number and identity of the employees to be laid off on 10 March and 8 April.

White and Zeppelin provided additional unrefuted testimony, supported by graphs the Respondent regularly maintains, that at the time of the layoffs the Respondent's "active" orders, as opposed to orders on hold, had declined to the point where they could no longer support full production, and that the Respondent had laid off employees under similar circumstances in 1978 and 1979. Local Union President Thompson, who worked in the Respondent's plant, testified that the Respondent's business was slack when the Respondent imple-

mented the 10 March and 8 April 1980 layoffs, just as it had been before the 1979 layoff.⁶

The Respondent's layoff decisions were arrived at on very short notice based on factors outside its control, and were consistent with past business decisions to lay off employees when orders declined substantially. We therefore find that bargaining would not have changed or delayed the Respondent's decisions to lay off employees on 10 March and 8 April 1980 to reduce unneeded production capacity. Accordingly, we conclude that a backpay remedy for the laid-off employees is unwarranted based on the law of the case.

We shall therefore delete the backpay requirements of our original Order.

SUPPLEMENTAL ORDER

Delete par. 2(b) of the Board's Decision and Order reported at 261 NLRB 852 (1982).

⁶ We deny the General Counsel's request to take administrative notice of the record in an unrelated, pending case (26-CA-9485) involving the Respondent, or to reopen the record to receive additional evidence. The present record adequately reflects the Respondent's business conditions at the time of both layoffs.